Supreme Court of the United States

OCTOBER TERM, 1942.

THOMAS J. PENDERGAST,
Petitioner,
VS.
UNITED STATES OF AMERICA,
Respondent.

No. 183.

ROBERT EMMETT O'MALLEY,
Petitioner,
VS.
UNITED STATES OF AMERICA,
Respondent.

No. 186.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS THOMAS J. PENDERGAST AND ROBERT EMMETT O'MALLEY.

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A.

OPINIONS OF THE COURT BELOW.

Both the majority and dissenting opinions of the Circuit Court of Appeals for the Eighth Circuit, filed June 1, 1942, are now officially reported (R. 1188, 1206). *Pendergast* v. *United States*, *O'Malley* v. *United States*, 128

Fed. (2d) 676, 687. The opinions of the trial court, both on motion to quash (R. 21) and on final judgment (R. 50, 65), are reported. *35 Fed. Supp. 593; 39 Fed. Supp. 189.*

B.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court has been invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U.S.C.A. 347(a)), and under the same Act, c. 229, Section 8, 24 Stat. 940 (28 U.S.C.A. 350).

On June 7, 1941 (R. 65) petitioners were convicted of criminal contempt by a purported statutory court, and sentenced to the penitentiary for terms of two years. These convictions were affirmed by the Circuit Court of Appeals for the Eighth Circuit on June 1, 1942 (R. 1213-1214). On June 27, 1942 and June 29, 1942, respectively, petitioners filed in this Court their petitions for writs of certiorari, with supporting briefs, together with the requisite copies of the certified record. Thereby each petitioner sought a review of the following rulings of the Circuit Court of Appeals: (1) That, although no act of such petitioner occurred in the presence of the court or in any geographical proximity thereto, he was nevertheless guilty of misbehavior in the presence of the court, within the meaning of Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385), and hence was punishable upon information for contempt (R. 1197); (2) That this prosecution is not barred by the fact that all allegedly contemptuous acts occurred more than three years next before the filing of the information, upon the ground that no statute of limitations is applicable to a prosecution for contempt for misbehavior in the presence of the court (R. 1197); (3) That, although the prosecution of such petitioner was in breach of his agreement with the

United States, such agreement did not give rise to any equitable right to have the proceedings stayed pending application for executive clemency (R. 1201); (4) That the trial court was vested with jurisdiction (R. 1205).

Review of each of said rulings was sought upon the appropriate grounds of conflict with applicable decisions of this Court, of conflict with decisions of other Circuit Courts of Appeals, and as presenting important questions of federal law which should be settled by this Court. *Pet. for Cert.*, pp. 10, 11, 12, 13. This Court granted certiorari on October 12, 1942.

C.

STATUTES INVOLVED.

The statutes of the United States involved are the following: *Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385); Section 135 of the Criminal Code (18 U.S.C.A., Sec. 241); R.S., Sec. 1044 (18 U.S.C.A., Sec. 582); Section 266 of the Judicial Code (28 U.S.C.A., Sec. 380).* These, together with the Missouri statutes involved, appear hereafter in the appendix.

D.

STATEMENT OF THE CASE.

This proceeding was initiated by an information by the United States on July 13, 1940, upon the official oath of the acting United States Attorney, and was entered upon the criminal docket of the Central Division of the Western District of Missouri as cause No. 5040 (R. 1). It was entertained by a purported statutory court constituted of Judge Kimbrough Stone, presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit, and Judges Albert L. Reeves and Merrill E. Otis of the District Court for the Western District of Missouri.

The information, briefly summarized, charged (a) the pendency of certain insurance rate litigation wherein interlocutory injunctions had issued restraining interference by Missouri officials with a promulgated rate increase by insurance companies, (b) the filing on June 18, 1935 by such companies of a motion for decree in accordance with a stipulation of settlement,* (c) the entry by the purported statutory court on February 1, 1936 of the decree as prayed, (d) that such settlement was corruptly procured by Charles R. Street, representative of the insurance companies, by the payment of divers sums of money to petitioner T. J. Pendergast and to petitioner R. E. O'Malley, then Missouri Superintendent of Insurance, with a codefendant, A. L. McCormack, acting as intermediary, and (e) that Pendergast, O'Malley and McCormack agreed to conceal such transactions, which were eventually disclosed by McCormack in March, 1939 to a grand jury investigating income tax evasion on the part of Pendergast.

After an appropriate motion to quash was filed (R. 10-14), and overruled with opinion filed (R. 21-31), petitioners answered (R. 32, 33, 38, 39). The proceeding came on for trial on April 14, 1941 (R. 348). Apart from the testimony of McCormack (R. 694-733), the material evidence was entirely documentary.

The Insurance Rate Litigation.

It appears by stipulation that on December 31, 1929 certain insurance companies in Missouri promulgated a rate increase and so advised the Missouri Superintendent of Insurance (R. 363). Before official action thereon in approval or disapproval, bills in equity were filed in the United States Court for the Central Division of the Western District of Missouri seeking injunctive relief against

*It will be noted that there is no charge that the alleged contempt was constituted of misrepresentations by counsel in open court.

official interference with the rate increase in question (R. 363, 364). The Superintendent thereupon refused to approve the increase, and amended bills were filed (R. 364-435). The bills in equity proceeded upon the theory that the action of the Superintendent as to rates was arbitrary, unconscionable and confiscatory (R. 365-435). A special master was appointed on September 22, 1930 (R. 602). In the meantime, on July 2, 1930, an interlocutory injunction had issued upon the ground of the allegedly confiscatory character of the action of the Superintendent (R. 501, 502), wherein official interference with the increased premium rates was restrained (R. 503), upon the condition, however, that the entire amount representing such increase should be impounded (R. 505) with a custodian appointed by the court (R. 506, 507). The special master, after hearings, filed a report, as to a number of the cases, sustaining the position of the companies.* A supplemental report as to the remaining cases was to follow. While the matter of the approval of this report was pending before the court, the companies, on June 18, 1935, filed a verified motion for decree, reciting that the litigation had been compromised (R. 603). On June 19, 1935 there was filed a stipulation of settlement in support of the motion for decree (R. 607). The actual compromise was accomplished by an agreement of May 18, 1935 (R. 890); the motion and stipulation aforesaid were prepared pursuant thereto. The substantial effect of the compromise was the retroactive approval by the Superintendent of four-fifths of the promulgated rate increase and the distribution of the impounded funds in accordance therewith.

The compromise agreement of May 18, 1935 was between O'Malley, as Missouri Superintendent of Insurance, and Street, as agent for the insurance companies involved (R. 890). By this agreement (R. 891) it was provided

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*28 Fed. Supp. 601, l. c. 603.

that four-fifths of the promulgated rate increase should be approved, that the parties thereto should seek appropriate orders for the distribution of impounded funds in accordance therewith, that the insurance companies should reimburse the Missouri Insurance Department for past expenses to the extent of $200,000, and pay the attorneys' fees of the Insurance Department in the sum of $500,000, and that new rates for the future should be filed in substantial conformity with the terms of the compromise.

At the trial no evidence was introduced relating to the proceedings intervening between the filing of the stipulation of settlement, in support of the motion for decree, on June 19, 1935, and the final decree, in accordance therewith, entered by the court on February 1, 1936. No such evidence was incorporated in any bill of exceptions. It was sought to be included in the record upon appeal solely on the praecipe by counsel for the United States to the Clerk of the United States District Court (R. 308 *et seq.*). Petitioners filed an appropriate motion to strike (R. 1144) which was overruled (R. 1150). These proceedings, thus purportedly incorporated in the record, as allegedly judicially noticed, revealed that divers hearings were had and briefs filed during the period subsequent to the motion for decree and prior to the entry of decree* (R. 937-1045). Such hearings pertained principally to the propriety of certain interventions (R. 943). Therein, however, in brief and argument, counsel for the insur-

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*These proceedings were judicially noticed, according to the trial court, only "for the limited purpose of ascertaining in this incidental proceeding the character of those cases and their status and condition on and prior to February 1, 1936" (R. 66). The trial court further limited this matter thus judicially noticed (R. 924):

> ". . . the court takes judicial notice of proceedings, records and files in those cases in so far only as that is necessary to support the Findings of Fact touching this status and condition on and prior to February 1, 1936, *but not, of course, to connect the defendants with the contempt charged.*" (Italics ours.)

ance companies and O'Malley represented to the court that the compromise was made in good faith and was desirable from all aspects.*

On February 1, 1936, the court entered its decree dismissing the causes and directing the distribution of the impounded funds. Aside from the sum reserved thereunder "for the purpose of taking care of the future expenses of the custodian and other matters", the record justifies the implication that the distribution to the companies and to the trustees for the companies was expeditiously made upon the entry of that decree (R. 781).

The Transactions Between Street and Pendergast, O'Malley and McCormack in 1935 and 1936.

The testimony of McCormack is the sole evidence upon this issue and, since it is brief, and to avoid controversy, may appropriately be digested:

> McCormack was engaged in the general insurance business in St. Louis, Missouri, and for a time was president of the Missouri Life Insurance Agents Association (R. 694-697). In the latter part of 1934 or in the early part of 1935, O'Malley, then Superintendent of Insurance, inquired of McCormack if the companies were interested in a settlement of the rate litigation (R. 699). He proposed a meeting between Street and Pendergast (R. 699). Street was chairman of the committee in charge of the Missouri situation on behalf of the companies (R. 700). The meet-

*These representations, relied upon in this Court by the United States as constituting the contempt charged, could not constitute such contempt, since they are not alleged, and no reference thereto is made, in the information (R. 1). Such was not the alleged contempt charged in that information. They could not have been considered by the trial court to support any finding of fact touching the status and condition of the insurance rate litigation on and prior to February 1, 1936 (R. 924). They are sought to be used upon appeal solely for the prohibited purpose of connecting petitioners with the contempt charged (R. 924) although unpleaded.

ing was arranged and took place in Chicago (R. 702, 733). In conference with Pendergast, Street pointed out that the "insurance companies had won this case" (presumably referring to the favorable report of the special master) but that the business of the companies was nevertheless suffering and their agents were complaining (R. 704). He expressed a desire to expedite the final disposition of the litigation (R. 704), and offered to pay Pendergast a fee of $500,000.00 to accomplish that end, to which the latter replied that "he would see what he could do about it" (R. 705). Early in 1935 (R. 782, 783) Street gave McCormack $50,000.00 which the latter delivered to Pendergast in Kansas City (R. 706, 707). On another occasion, during the early part of the same year (R. 783), Street delivered a further $50,000.00 to McCormack, who brought it to Pendergast in Kansas City; the latter retained $5,000.00 and McCormack and O'Malley divided the remaining $45,000.00 (R. 709, 710). Subsequently, in the spring or early summer of 1936 (R. 783), Street gave McCormack $330,000.00, and the latter brought that sum of Kansas City (R. 711). Pendergast took $250,000.00 and gave McCormack $80,000.00 (R. 712). McCormack divided the $80,000.00 with O'Malley (R. 713, 714). In October, 1936 (R. 783), when Pendergast was ill in the hospital, McCormack, at the instance of Street, delivered to him a further sum of $10,000.00 (R. 783, 784, 716, 717).

In May, 1935, McCormack attended a conference at the Muehlebach Hotel in Kansas City, Missouri, called for the purpose of attempting to effect a settlement of the rate litigation (R. 724). Street, O'Malley and various counsel attended; Pendergast was not present (R. 724). The conference extended into the night before agreement was reached (R. 724, 725).

In February and March of 1939 McCormack appeared before the grand jury investigating charges of income tax evasion against Pendergast and O'Malley (on account of their failure to report the receipt of the sums mentioned*) and was interrogated with ref-

*28 Fed. Supp. 601, l. c. 604.

erence to his delivery of the various sums of money mentioned (R. 717). He appeared before the grand jury three or four times (R. 717). Upon his first appearance he did not testify to the transactions in question* (R. 718). While he was thus under subpoena before the grand jury, he saw O'Malley *but not Pendergast* (R. 719). He did not discuss his testimony with him (R. 719): O'Malley remarked in substance that "he *hoped* nothing would develop that would involve *him*" (R. 722).

McCormack testified affirmatively that there was no agreement (as charged in the information) to keep the transactions in question secret or to prevent the court from discovery thereof (R. 728). After O'Malley had expressed the *hope* that his name would not be brought into the matter, McCormack nevertheless disclosed the entire history of the transactions in question (R. 728).

It will be noted that the testimony of this government witness (the only witness upon the issue) does not sustain the findings of fact by the trial court (R. 51). The information charges (R. 8) that McCormack, at the instance of O'Malley, committed perjury before the 1939 grand jury, investigating tax evasion on the part of Pendergast, in an effort to conceal these transactions. The record however, discloses merely (and this was *all* the proof) that, on his *first* appearance before the body, he did not tell "them the story of this transaction as you have told from the witness stand this afternoon" (R. 718). Objection to this meaningless, incompetent conclusion was overruled. Consistent, as it was, with refusal to testify on constitutional grounds, with failure to detail the transactions so circumstantially as from the stand, or upon a multiplicity of other hypotheses, all consistent with innocence, this vague, indefinite response is the sole purported proof relied upon by the United States to support the charge made. Equally is the charge that O'Malley

*This proof, consistent with refusal to testify on constitutional grounds, was referred to by the trial court as an admission of perjury (R. 27).

importuned McCormack to commit perjury to conceal the corruption of the insurance settlement, *allegedly pursuant to an original agreement*, unsupported by proof. McCormack repeatedly testified (as a government witness) that there never was such an agreement (R. 728, 729, 730), and that O'Malley merely expressed the *hope* that *his* name would not be brought into the matter (R. 721).

The grand jury was investigating alleged income tax evasion on the part of Pendergast and O'Malley; had McCormack acted upon this *hope* of O'Malley thus expressed, and kept *his* name out of the matter, the payments to Pendergast would nevertheless have been disclosed. Thus the evidence fails to establish that this action of O'Malley was an overt act pursuant to an original conspiracy; in fact the government introduced affirmative evidence to the contrary by its own witness. There is no evidence to justify the suggestion that Pendergast entered into the strange agreement that *O'Malley's* but not *his* name should be kept out of the matter. O'Malley did not base his *hope* upon any prior arrangement, express or implied; according to McCormack, his importunities were obviously not referable to any prior agreement, but were the spontaneous expression of self-interest. Similarly, if McCormack *had* committed perjury, that perjury (even had he not denied the existence of any agreement to that end) would not establish that his action was referable to an original conspiracy so to do; when he disclosed these transactions, he convicted himself of tax evasion, and self-interest again would furnish full, adequate and logical explanation therefor. Thus the proof affirmatively negatives the existence of the conspiracy charged to conceal by affirmative acts, and disproves the suggestion that any act of O'Malley or McCormack in 1939 was an overt act pursuant to such a prearrangement; Pendergast admittedly was not consulted; and the alleged acts were clearly referable to present motives of self-interest and, under the evidence, are not shown to be chargeable to Pendergast or to any concert of action of any character.

The Grand Jury Investigation of Pendergast and O'Malley in March, 1939 on Charges of Income Tax Evasion, the Agreement of Pendergast and O'Malley with the United States, and the Pleas of Guilty Entered Pursuant Thereto.

As appears from the information (R. 8) and from the testimony of McCormack (R. 717), a grand jury investigation of Pendergast and O'Malley on charges of income tax evasion for having failed to report the receipt of the sums mentioned from Street was conducted during February and March of 1939*. There is no claim that that grand jury investigation concerned the rate litigation; the issue was solely one of income tax evasion. Pendergast and O'Malley were indicted therefor (R. 841, 858, 859). It was subsequently agreed between the United States and Pendergast and O'Malley that, if the latter entered pleas of guilty to the tax evasion indictments, there would be no further prosecution on account of other offenses. The agreement took into account specifically the alleged contempt arising from the transactions incident to the compromise of the insurance rate litigation, and it was in terms agreed that there would be no prosecution therefor (R. 840, 841, 842, 843, 845, *et seq.*). This agreement was confirmed in open court by the acting United States Attorney (R. 845), by the Chief of the Appellate Section of the Criminal Division of the office of the Attorney General of the United States (R. 848), and by the United States Attorney who had made the original agreement (R. 852, 853). Pursuant to that agreement Pendergast and O'Malley entered pleas of guilty (R. 843, 845). After the entry of these pleas, but before sentence, the United States Attorney fully advised the trial court (in scrupulously carrying out the agreement made) that the pleas concluded all proceedings against Pendergast and O'Malley,

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*Opinion, *United States* v. *Pendergast, United States* v. *O'Malley*, 28 Fed. Supp. 601, l. c. 604.

including any proceeding for alleged contempt, and that there would be no prosecution therefor (R. 842, 843). Sentences were imposed, and served (R. 843, 844).

The Reopening of the Insurance Rate Litigation.

When the foregoing transactions were disclosed, the successor Superintendent of Insurance on May 29, 1939 filed a motion to cite the insurance companies to show cause why the decree of February 1, 1936 should not be vacated or modified (R. 746). On the same day, the court entered an order of restitution, directing that all funds paid out to the insurance companies under the decree of February 1, 1936 be restored to the custodian (R. 756). An order to show cause was also entered on the same date whereunder the insurance companies were directed thus to show cause why the restored funds should not *instanter* be distributed among the policyholders (R. 758). On August 14, 1940, the court entered its decree directing the distribution among the policyholders of the funds theretofore, under the decree of February 1, 1936, ordered paid to the insurance companies or their representatives (R. 628).

It appears that upon the reopening of the rate litigation on May 29, 1939, the three-judge court had directed the United States Attorney to take steps to prosecute both summarily and by indictment any persons guilty of contempt or of obstruction of justice (R. 806). On May 20, 1940, the three-judge court requested the acting United States Attorney to prosecute for contempt, and inquired if his *office* was willing to assume that duty (R. 808, 809). It thus appears that the acting United States Attorney was requested to proceed, not as *amicus curiae*, but in his official capacity. As a result, the information was filed in the name of the United States by the United States Attorney in his official capacity and upon his official oath (R. 1).

The Conviction of Petitioners and Subsequent Proceedings.

Upon these facts the trial court filed its opinion on May 28, 1941 (R. 50), and judgment and sentence were pronounced on June 7, 1941 (R. 65).

This proceeding was entitled cause No. 5040 on the criminal docket of the Central Division of the Western District of Missouri up until the time of final judgment (R. 1). As a part of such judgment the trial court directed the clerk to restyle all pleadings and orders theretofore filed by adding to the designation, cause No. 5040, the descriptive term "a proceeding in contempt incidental to equity cases Nos. 270 to 426, inclusive" (R. 66, 1184). While in the record the information and present pleadings and orders carry that descriptive style, they were not so styled up to the time of final judgment, and then were retroactively modified by the clerk in obedience to the order.

Appeals were taken both to this Court and to the Court of Appeals. *Thomas J. Pendergast* v. *United States*, *Robert Emmett O'Malley* v. *United States*, 314 U. S. 574, 86 L. Ed. 55. Upon appeal, in the court below, petitioners contended: (1) That neither the acts charged nor proved constituted misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice; (2) That prosecution was barred by the statute of limitations; (3) That the conviction of petitioners should be reversed and further proceedings stayed, for the reason that the prosecution was in violation of an agreement with the United States; (4) That the court below was without jurisdiction.

These contentions were rejected (R. 1188 *et seq.*). They constituted the questions presented to this Court in the petitions for certiorari (p. 10). They are now incorporated in the specification of errors intended to be urged.

E.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

Each petitioner specifies the following errors:

(1) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding such petitioner guilty of contempt punishable upon information, *i.e.*, misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of *Section 268 of the Judicial Code* (*28 U.S.C.A., Sec. 385*). (R. 52, 53, 57-59, 66, 1195-1197).

(2) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding that the acts charged against such petitioner constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of *Section 268 of the Judicial Code* (*28 U.S.C.A., Sec. 385*). (R. 1, 10, 14, 21, 25, 40, 50, 52, 53, 57, 59, 66, 1193, 1195).

(3) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding that the acts shown in evidence constituted misbehavior on the part of such petitioner in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of *Section 268 of the Judicial Code* (*28 U.S.C.A., Sec. 385*). (R. 1, 10, 14, 21, 25, 40, 50, 52, 53, 57, 59, 66, 1193, 1195).

(4) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding that the prosecution of such petitioner under the information was not barred by the statute of limitations (*i.e., R. S., Sec. 1044; 18 U.S.C.A., Sec. 582*) or by the fact that the information was not filed within three years next after the

alleged contemptuous acts. (R. 13, 17, 18, 25-30, 34, 41, 61, 63, 66, 1197, 1200).

(5) The Circuit Court of Appeals, and the trial court, erred in refusing to give effect to the agreement between the United States and such petitioner whereunder it was agreed that, if petitioner entered a plea of guilty to an indictment charging income tax evasion, he would not be prosecuted for alleged contempt; by reason of such agreement the instant prosecution should either have been abated or stayed pending an application for executive clemency and appropriate action thereon by the Executive. (R. 35, 36, 45, 46, 53, 58, 59, 63-65, 1201).

(6) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding that the latter was vested with jurisdiction to entertain this proceeding for criminal contempt, and to impose therein a punitive sentence. (R. 11, 14, 15, 22, 23, 35, 39, 40, 59, 60, 1136, 1137, 1161, 1162, 1179, 1202-1205).

(7) The Circuit Court of Appeals and the trial court, erred in holding, deciding and finding that, if the trial court was without jurisdiction in this proceeding, its judgment convicting such petitioner was validated by the fact that one of its members, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation. (R. 1161-1163, 1179, 1205, 1206).

(8) The trial court erred in refusing to sustain, and in overruling, such petitioner's motion to declare him not guilty and to dismiss the proceeding, and the Circuit Court of Appeals erred in affirming such ruling. (R. 66, 876, 883, 1188-1206, 1213, 1214).

F.

SUMMARY OF THE ARGUMENT.

POINT I.

The conduct (charged or proved) of petitioners did not constitute misbehavior on their part in the presence of the court or so near thereto as to obstruct the administration of justice within the meaning of Section 268 of the Judicial Code (28) U.S.C.A., Sec. 385) and did not render them punishable for contempt upon information. Petitioners at no time were in the presence of the court or in geographical proximity thereto. No misbehavior there occurred. No claimed misconduct disrupted order or decorum or actually interrupted the court in the conduct of its business. The majority opinion below (Riddick, J., dissenting) reverts to the doctrines of the Toledo Case (247 U. S. 402, 62 L. Ed. 1186) in holding that the misconduct of petitioners occurred constructively in the presence of the court, although actually occurring at points geographically remote therefrom, upon the theory that by a chain of causation it took effect there. The conviction of each petitioner, therefore, violates the rule in Nye v. United States, 313 U. S. 33, 85 L. Ed. 1172, and other controlling authorities. As a result, the judgment below must be reversed.

POINT II.

Prosecution of petitioners under the information was barred by the statute of limitations since all acts of alleged misconduct occurred more than three years next before the filing of the information. Under controlling decisions of this court this prosecution was subject to the three-year statute of limitations (R. S. Sec. 1044; 18 U.S.C.A., Sec. 582) relating to offenses (not capital) against the United States. The majority opinion below, however, and the trial court, ruled that the criminal contempt here

sought to be charged was not an offense within the meaning of that statute, and that no statute of limitations was applicable thereto either by enactment or analogy. This was error. and the judgment below must be reversed. Gompers v. United States, 233 U.S. 604, 58 L. Ed. 1115, United States v. Goldman, 277 U.S. 229, 72 L. Ed. 862, and Ex Parte Grossman, 267 U.S. 87, 69 L. Ed. 527.

POINT III.

The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioners under the information is in violation of their agreements with the United States that, if they entered their pleas of guilty to indictments charging income tax evasion, they would not be prosecuted for alleged contempt. Petitioners performed that agreement. Under the rule declared by this court in United States v. Ford, 99 U.S. 593, 25 L. Ed. 399, such agreement vested in petitioners an equitable right to have any prosecution for contempt stayed pending an application for executive clemency. The majority opinion below, and the ruling of the trial court, in refusing to give effect to the agreements, is in conflict with the foregoing controlling decision of this court. The conviction below violates such equitable rights vested in petitioners, and must be reversed.

POINT IV.

The trial court was without jurisdiction to entertain this proceeding. It was at most a statutory court of limited equitable jurisdiction. This proceeding is an independent prosecution at law for criminal contempt, and is neither incidental nor ancillary to the original equitable litigation before the statutory court. That court could neither acquire nor exercise jurisdiction thereover. In holding that the instant proceeding was incidental to the original equitable litigation pending before the trial court, the decision

of the majority opinion below, and the ruling of the trial court, violated the rule declared in Gompers v. Stove Company, 221 U.S. 418, 55 L. Ed. 797, and Michaelson v. United States, 266 U.S. 42, 69 L. Ed. 162, l.c. 167, and, in further holding that the trial court was vested with jurisdiction herein, such decision failed to follow the decision of this court in this case (Pendergast v. United States, O'Malley v. United States, 314 U.S. 574, 86 L. Ed. 55) and in Phillips v. United States, 312 U.S. 246, 85 L. Ed. 800, Public Service Commission v. Brashear Freight Lines, 312 U.S. 621, 85 L. Ed. 1082, and Ex Parte Bransford, 310 U.S. 354, 84 L. Ed. 1249. When the trial court was thus without jurisdiction, its action could not be validated by the circumstance that one of its members, at the time of the institution of the original rate litigation, was judge of the Central Division of the Western District of Missouri. The trial court conceded that at the time of the institution of this proceeding no member thereof was judge of such central division. Thus the conviction below was extra-jursidictional and void.

G.

ARGUMENT.

POINT I.

The conduct of each petitioner (charged or proved) did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385), and did not render him punishable for contempt upon information; the conviction below must, therefore, be reversed.

The ruling below on this issue is in plain conflict with the unambiguous terms of the statute under which the prosecution has been conducted, and, as well, with the last controlling decision of this Court. Section 268, Judicial Code (28 U.S.C.A., Sec. 385); *Nye* v. *United States*, 313 U.S. 33, 85 L. Ed. 1172. That the majority opinion below constitutes a complete departure from the rule declared in the authority last cited is strikingly demonstrated by the dissenting opinion (R. 1206-1212). *Pendergast* v. *United States*, *O'Malley* v. *United States*, 128 Fed. (2d) 676, l.c. 687.

The position of petitioners briefly, is this: the foregoing statute declares that, before petitioners can be punished for contempt upon information or other form of summary proceeding, it must appear that they, at the time of the misbehavior relied upon as constituting the contempt, were in the presence of the court or so near thereto as to obstruct the administration of justice; their presence before the court, or in the proximity indicated, must have been actual and not constructive; and if they were not thus in the actual presence of the court or in such proximity, it is immaterial whether their misbehavior elsewhere, by any chain of causation, eventually took effect in the presence of the court. The misbehavior charged

must have occurred in the presence of the court or in the required proximity thereto; the person charged with the misbehavior must, at the time thereof, have been in the presence of the court or in the required proximity thereto. For prosecution of a given person for contempt upon information there must appear misbehavior on the part of *that* "person in their presence, or so near thereto as to obstruct the administration of justice". If the person charged was not thus present, if at the time of misbehavior he was geographically removed from the presence of the court, then, however obstructive to the administration of justice his misbehavior should prove, irrespective of the circumstance that such misbehavior, by its resulting consequences, took effect in the actual presence of the court, he can be prosecuted only by indictment. *Section 135, Criminal Code, 18 U.S.C.A., Sec. 241.*

As a corollary to the foregoing proposition, authoritative construction of the contempt section above cited has attached the further condition that, for summary prosecution upon information, it is essential that the misbehavior of the person charged in the vicinity of the court must be of a character "disrupting its quiet and order or actually interrupting the court in the conduct of its business": *Nye* v. *United States, supra,* l. c. 52. There are, therefore, two prerequisites to prosecution for contempt upon information: (a) the actual presence of the person charged at the time of misbehavior before the court or in immediate geographical proximity thereto; (b) disruptive misbehavior on his part when thus present. Neither prerequisite appears in the instant case.

The present law of contempt stems from the statute of March 2, 1831 (*4 U.S. Statutes at Large 487*):

"Statute II.

March 2, 1831.

"An Act declaratory of the law concerning contempts of court.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule decree or command of the said courts.

Cases for Summary Proceedings.

"Sec. 2. And be it further enacted, That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

Cases for Indictment.

"Approved, March 2, 1931."

The first section of the foregoing Act is now Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385):

"Sec. 385. (Judicial Code, Section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbe-

havior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (R. S., Sec. 725; Mar. 3, 1911, Ch. 231, Sec. 268, 36 Stat. 1163)."

The second section of the 1831 Act is now Section 135 of the Criminal Code (18 U.S.C.A., Sec. 241):

"Sec. 241. (Criminal Code, Section 135). Attempting to influence witness, juror, or officer. Whoever corruptly, or by threats or force or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both (R. S., Secs. 5399, 5404; Mar. 4, 1909, Ch. 321 Sec. 135, 35 Stat. 1113)."

This Court has pointed out (*Nye v. United States, supra*) that, for nearly a century following the 1831 Act, authoritative construction accepted its plain, natural interpretation*. *Ex parte Poulson*, 19 Fed. Cases 1205, case No. 11350, l. c. 1208; *Ex parte Schulenburg*, 25 Fed. 211, l. c. 214; *Boyd v. Glucklich*, 116 Fed. 131, l. c. 136; *Ex parte*

*For the historical background of the law of contempt, demonstrating the basic soundness of this interpretation, we refer to the following: Frankfurter & Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts - A Study in Separation of Powers, 37 Harvard L. Rev. 1010; Nelles

Robinson, 86 U. S. 505, 22 L. Ed. 205. The controlling effect of the foregoing authorities was recently recognized by the court below. *Morgan* v. *United States*, 95 Fed. (2d) 830, l. c. 835. As pointed out by this Court in the *Nye* case, artificiality first crept into the construction of the Act of 1831 in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 62 L. Ed. 1186. By the majority opinion in that case the distinction between Sections 1 and 2 of the Act of 1831 was destroyed. The requirement that the offender must be in the presence of the court or in the geographical vicinity thereof was abrogated. The further requirement that the misbehavior charged must not only be in the vicinity of the court but must also be disruptive of its order and decorum was disregarded. The test adopted was one of obstructive effect upon the administration of justice. Under that doctrine any act punishable under the second section of the Act of 1831 was equally punishable under the first section, and the restrictions imposed by the Act upon the power to punish on information or other summary process were judicially eliminated.

By the Act of 1831 Congress curtailed the power to punish for contempt by summary process; the majority opinion in the *Toledo* case ignored the curtailment. Before the recent *Nye* case, this was pointed out strikingly in the dissenting opinions of Mr. Justice Holmes, who continued to adhere strictly to the natural construction of the Act. *Toledo Newspaper Co.* v. *United States*, *supra*, l. c. 422; *Craig* v. *Hecht*, 263 U. S. 255, l.c. 280, 68 L. Ed. 293. The *Toledo* case, obliterating the distinction between the first and second sections of the Act, in effect conferred, in the event of an alleged contempt, an election of remedies. The result was grotesque. Under the

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& King, Contempt by Publication in the United States, 28 Columbia L. Rev. 401, 525; Nelles, The Summary Power to Punish for Contempt, 31 Columbia L. Rev. 956; Thomas, Problems of Contempt of Court, 1934 Ed.; Sir John C. Fox, The History of Contempt of Court, 1927 Ed., reviewed in 27 Columbia L. Rev. 1013.

first section of the Act the power to punish by fine or imprisonment was unlimited except by the discretion of the court concerned in the offense. Under the second section, however, the maximum penalty was a nominal fine or imprisonment for a period of three months, or both. It is inconceivable that Congress, in thus limiting the penalty under the second section intended that by the *Toledo* case doctrine of ultimate *effect*, the offense could also be punished under the first section by an unlimited penalty. The fundamental fallacy, of course, in the *Toledo* case was its denial that the first section of the Act rigidly limited the power of the courts to punish for contempt upon information or summary process; thereafter, as Mr. Justice Holmes pointed out, the court could only by such process take action where necessary "in a strict sense . . . to enable him to go on with his work". *Craig* v. *Hecht*, *supra*:

> We stress the artificiality of the *Toledo* case doctrine because the instant proceeding was initiated and prosecuted under the theory of that authority. Thus the trial court declared that "if the tendency of the misbehavior is to affect the administration of justice, it is contempt" (R. 25). In that opinion it was stated that a letter mailed in London could constitute contempt of a United States court in Missouri "because it takes effect in the presence of the court" or "at any rate it is so near to the presence as to obstruct the administration of justice" (R. 26). Although the trial court considered the *Nye* case, it adhered to its former views upon final judgment. Thus the trial court remarked* (R. 57):
>
> > "The misbehavior of these defendants was committed where it took effect and where it was intended to take effect."
>
> The majority opinion below proceeds upon the same theory that the misbehavior occurred in contemplation

*Compare this dictum with the discussion in Thomas, Problems of Contempt of Court, 1934 Ed., p. 63.

of law wherever its *consequences* occurred (R. 1195). *That is the Toledo doctrine. Any* act of misbehavior, in order to violate *either* the first or second sections of the Act of 1831 *must* take *effect* in the presence of the court; otherwise it could not be contemptuous within the contemplation of either section; the distinction between the misbehavior specified in the two sections lies not in the place where the misbehavior takes *effect* but in the place where the misbehavior *occurs*. The fallacy of the *Toledo* doctrine was that *constructive* presence before the court was substituted for the statutory requirement of *actual* presence before the court; the person charged was held under the doctrine of causal effect to have been present, and there to have committed misbehavior, when he was actually absent and committed his alleged misbehavior elsewhere. The same fallacy permeates the majority opinion below. Petitioners have been found *constructively* in the presence of the court when *actually* absent; misbehavior has been held to have occurred *constructively* in the presence of the court when it *actually* occurred elsewhere; and, as in the *Toledo* case, these judicial results have been accomplished under the doctrine that, as a matter of law, misbehavior must be held to occur where it takes effect. *The trial court thus reverted to or persisted in following the exploded Toledo case doctrine of causal effect in the month following its condemnation by this Court.*

We apprehend that in the *Nye* case this Court plainly rejected the *Toledo* case test of the place where the misbehavior eventually took effect, the "tendency to obstruct the administration of justice" doctrine, in favor of the test required under the Act of the geographical location of the misbehavior and of the accused. In the *Nye* opinion it was freely conceded that the misconduct had as its purpose and effect the obstruction of the administration of justice (l. c. 52). Although the trial court in the instant case clung to the view that misbehavior took place where it took effect, and was intended to take effect, to the doctrine that obstructive misbehavior could only take

effect in the presence of the court, and that, therefore, if the purpose and effect of the misconduct were an obstruction to the administration of justice, such intended effect brought such misbehavior *constructively* into the presence of the court, the opposite result had been reached by this Court in the *Nye* opinion a month before (l. c. 52). It will be recalled that in the *Nye* case, as in the instant case, the "effect" or "reasonable tendency" theory was relied upon by the court below to sustain the contempt charged. *Nye* v. *United States*, 113 Fed. (2d) 1006, l. c. 1008. In both cases the Circuit Court of Appeals argued that the misbehavior had the effect, and was intended to have the effect, of interfering with the court in the performance of its functions, and that, therefore, the misbehavior took place constructively where the intended result occurred, *i. e.*, in the presence of the court. This Court, however, held that the words "so near thereto" had a geographical and not a causal connotation (l. c. 48), and that the place where the misbehavior took effect could not "in any normal meaning of the term" alter the admitted fact that such misbehavior actually occurred elsewhere.

The *Nye* case and the instant case are precisely parallel. In the *Nye* case the misconduct occurred, the "evil influence" was brought to bear, at a point remote from the court; in the instant case equally the misconduct occurred, the "evil influence" was brought to bear, at a point remote from the court. In the *Nye* case the court below sought to bring the remote point where the misconduct occurred into the courtroom by the argument that the misconduct there had its intended effect; in the instant case, similarly, the court below seeks to transport into the courtroom points in Chicago, St. Louis and Kansas City by the argument that misconduct there occurring had its intended effect in that courtroom. In the *Nye* case the defendants personally mailed the motion for dismissal (in the form of a letter) to the court; in the instant case the insurance companies filed a motion for decree, supported by a stipulation executed by counsel for O'Mal-

ley. The court below, however, argues that the motion for decree, with the supporting stipulation, was filed or transmitted to the court through counsel as innocent emissaries (R. 1194), and that the latter represented that the compromise was honest and not fraudulent. As the dissenting opinion points out (R. 1211), the statements of counsel added nothing to the mere filing of the motion. The parallel with the *Nye* case is inescapable. In that case the innocent emissary was the mailman; in the instant case the innocent emissary was a lawyer. In neither case did any misbehavior occur in the presence or vicinity of the court; the innocent emissary was not guilty of misbehavior by reason of his innocence; he who sent the innocent emissary was not guilty of misbehavior in the vicinity of the court because he was not there. *The innocent emissary theory of the court below is but another variant of the constructive presence doctrine of the Toledo case.*

Again, moreover, the parallel does not end. As pointed out in the dissenting opinion below (R. 1211), every act of counsel, relied upon by the majority opinion to support the theory of misbehavior in the presence of the court, occurred equally in the *Nye* case. There, as in the instant case, the misconduct at a point remote from the courtroom was sought to be carried into effect in the courtroom by the filing of motions and the appearance of counsel in their support. Thus it appears from the petition for certiorari (p. 2) in the *Nye* case that the occasion for the citation for contempt was the hearing in open court of a motion to dismiss based upon the fraudulent discharge of Elmore as administrator. This statement is supported by the official record in that proceeding (pp. 155, 156). There is not a single fact or circumstance in the instant case, treated as significant by the majority opinion below, which was not present in the *Nye* case.

In the final analysis, the majority opinion below, in attempting to distinguish the *Nye* case, adopts the theory that the contempt charged occurred when counsel for the insurance companies and O'Malley innocently represented

to the three-judge court that the compromise was not corrupt. *Such was not the contempt charged in the information,** and the evidence in proof of such representations could not properly be utilized to establish such alleged contempt. See Statement, *supra*, pp. 6, 7. Aside from these considerations, however, such reasoning in the majority opinion proceeds upon a fundamental fallacy. No misbehavior occurred at the time of such innocent representations by counsel. The same argument, relied upon by the majority opinion below, was advanced by the United States in the *Nye* case, but rejected by this Court. Thus it appears that the theory of the United States in that case was that Nye "attempted to deceive the judge", and that his conduct "was a deliberate attempt to thwart the prosecution of an action by undue influence exercised on the litigant and *misrepresentations made to the court*" (l. c. 37, 38). It appears, moreover, that subsequent to his misbehavior Nye did not merely permit innocent counsel to make representations to the court; he appeared, testified, and (*semble*) committed perjury, in attempted consummation of the object of his prior misbehavior (l. c. 40). Thus on July 20, 1939, Nye apparently denied misconduct and asserted under oath that he only caused the motion to dismiss (in letter form) to be prepared because Elmore, on his own initiative, desired it (*Nye* R. 155, 156). The conduct of Nye more closely approached misbehavior in the presence of the court than any act of either petitioner in the instant case. Both the majority and dissenting opinions of this Court, however, recognized that his misbehavior was neither in the presence of the court (l. c. 53) nor in the required proximity thereto. The controlling effect of the *Nye* opinion cannot be ignored.

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*If the claimed contempt, as under the theory of the trial court, of the majority opinion below, and of opposing counsel (to support the contention of misbehavior in the presence of the court) consisted of the representations of counsel, the second specification of error must be sustained since no such alleged contempt was charged in the information.

The majority opinion below finally argues that in the instant case the court was deceived, while, in the *Nye* case Elmore alone was deceived. This attempted distinction is completely answered in the dissenting opinion (R. 1211, 1212). It is plain that the contempt sought to be charged in the *Nye* case was not the overreaching of Elmore any more than was the contempt sought to be charged in the instant case the bribery of O'Malley; the contempt sought to be charged equally in both cases was the seeking of judicial action to carry into effect a previously perpetrated fraud. This is plainly recognized by the majority opinion at another point (R. 1194).

We have mentioned *supra* that if any person transmits to the court a motion invoking judicial action, he irresistibly implies thereby a representation that his action is in good faith and not a fraud upon the court. Verbal representations to the same effect add nothing thereto. Hence any representations by counsel in the *Nye* case or the instant case do not go beyond the inevitable implication of good faith arising from the mere filing of the respective motions in both cases. Whether the representation of good faith be express or implied is immaterial. The dissenting opinion so held (R. 1211).

Misbehavior in the presence of the court is a plain, simple, unambiguous term which, as pointed out in the *Nye* opinion, must be construed in its normal meaning (l. c. 52). It cannot be extended by construction or interpretation. *Realistically viewed, taking the term in its normal meaning, where did the misconduct, the misbehavior, of petitioners occur? Is it not plain that it occurred in Chicago, St. Louis and Kansas City, at points remote from the courtroom?* There was no misbehavior by any person in the presence or vicinity of the court. The conduct of counsel was entirely ethical and in every respect irreproachable. How, then, unless we extend the term "misbehavior" beyond its normal acceptation, can it be said that their conduct constituted misbehavior? Petitioners admittedly were not present at any time in the vicinity of the court. The majority opinion below

seeks to twist the issue into whether, if the charge were a conspiracy to perpetrate a fraud upon the court, the act of an innocent emissary could be chargeable to a person then elsewhere.* That is not the issue; if it were, the act of the mailman, of counsel, in the *Nye* case would have been charged to Nye. The true issue is much narrower, *namely*, whether the proof establishes misbehavior of petitioners in the presence of the court. The issue is not one of criminal responsibility for the act of another, but one simply of the geographical location of the accused and of the occurrence of particular misbehavior. The innocent emissaries did not misbehave in the presence of the court; petitioners did not misbehave in the presence of the court. We submit that the dissenting opinion properly declares (R. 1211):

> "I perceive no distinction between the Nye case and this case. None is drawn by the majority opinion."

On certiorari, opposing counsel have attempted to draw certain distinctions between the *Nye* case and the instant case which, in the interest of orderly discussion, may properly be anticipated. Counsel suggested these distinctions (*Brief in Opposition to Certiorari*, pp. 34 *et seq.*): *First*: That, although under the theory of counsel, Nye was guilty of misbehavior in the presence of the court, this Court overlooked this circumstance and, in discharging Nye as guiltless of contempt, committed inadvertent error in considering only the phrase "so near thereto," and overlooking the companion phrase "in their presence." Such an argument requires no answer; even the dissenting opinion pointed out that there was no misbehavior in the presence of the court (l. c. 53). *Second*: That Nye overreached Elmore, but not the court. This contention is so completely answered by the dissenting opinion below that no further discussion is necessary (R.

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*This is the fallacious "analogy to the doctrine of constructive presence as developed in the criminal law." *Thomas, Problems of Contempt of Court, 1934 Ed., p. 63.*

1211-1212). *Third*: That the misconduct of Nye did not occur in open court. The misconduct of petitioners did not occur in open court. In both cases the misconduct occurred elsewhere; in both cases the misconduct, occurring elsewhere, was sought to be consummated by a pleading presented to the court with representations, express or implied, of good faith in so doing. *Nye also testified under oath to that good faith.* In both cases the pleading presented was rendered improper *only* by reason of previous misconduct. In the *Nye* case the motion to dismiss (in letter form) would admittedly have been non-contemptuous had it not been for the previous misconduct; in the instant case the motion to dismiss and for decree would have been admittedly non-contemptuous had it not been for the previous misconduct. The parallel is unmistakable. The "evil influence" in both cases is identical; in both cases that influence was brought to bear at points remote from the courtroom. This Court, however, pointed out in the *Nye* case that the circumstance that the perpetrated fraud was sought to be consummated by such a pleading presented to the court was "inconsequential" (l. c. 52). *Fourth*: That Nye did not appear in court by counsel. Under the theory of opposing counsel in the instant case, however, both Nye and Pendergast would be held to have contemplated the necessary appearance of counsel in open court in consummation of their misconduct. Pendergast did not appear in court by counsel. As mentioned *supra*, moreover, Nye appeared in open court in person and testified in denial of his misbehavior; but this was held not to have the effect of bringing his previous misconduct into the presence of the court or the required geographical proximity thereto. *Fifth*: That the misconduct of Nye was not contemptuous because it occurred before answer, and that dismissal could have been accomplished without judicial order. Dismissal in the instant case could have been accomplished without judicial order. *Aetna Insurance Co.* v. *O'Malley*, 342 Mo. 800, 118 S. W. (2d) 3, l. c. 9, 10; *State ex rel.* v. *Dinwiddie*, 343 Mo. 589,

122 S. W. (2d) 912. Hence, in the instant case, appearance in the presence of the court was neither necessary nor contemplated by Pendergast. *Sixth*: That if the innocent emissary presenting (for ultimate consummation of the previously perpetrated fraud) a pleading to the court is a layman, those guilty of misconduct are not guilty of contempt, but, if such emissary is a member of the bar, they *are* guilty of contempt. We fail to recognize the distinction. In each instance such presentation is material only under the theory of constructive presence; the professional qualifications of the emissary are manifestly immaterial. It is even suggested, in this connection, that there is a vital distinction between the delivery of a pleading to the court and the delivery of a pleading to the secretary of the court for redelivery to him. We again fail to recognize the distinction. In the *Nye* case the court received the motion (*Nye record*, p. 154; 313 U. S. 33, l. c. 52), and acted thereon in his judicial capacity. We do not assume that this Court, in determining a basic governmental principle in the *Nye* case, intended the determination thereof to depend upon insignificant circumstances such as the foregoing. We refer to the dissenting opinion below in this connection (R. 1211). In conclusion we suggest that it ventures upon presumption to suggest that this Court in the *Nye* case construed only the phrase "so near thereto" and overlooked the companion phrase "in their presence." Certainly the circumstance that in one instance (the *Nye* case) the fraud was unsuccessful, and in the other instance temporarily successful, is of no consequence. Consider the final absurdity: That the determination of a great governmental principle should turn upon the fortuitous circumstance of whether action by counsel in open court was directed or merely contemplated as an inescapable incident, of whether a dismissal sought pursuant to a previously perpetrated fraud was before or after answer, of whether an innocent emissary was a member of the bar, or of whether a given pleading was delivered directly to the judge or to his secretary for re-

delivery to him. Counsel seek to emphasize that O'Malley agreed in writing that the settlement should be presented to the court. The conspirators in the *Nye* case agreed that the results of their fraud should be presented to the court, and, in fact, themselves mailed the motion directly to the court. Do counsel detect any significance in the circumstance that the agreement in one instance was in writing and in the other oral? We submit that the purported distinctions are hypertechnical quibbles.

The majority opinion below, and opposing counsel, contend that the instant proceeding is ruled by *Sinclair* v. *United States* (279 U. S. 749) (L. Ed.). That decision, however, can no longer be the law; it was bottomed squarely and exclusively upon the *Toledo* case and its now exploded doctrine (l. c. 764, 765):

> "The reasonable tendency of the acts done is the proper criterion. . . . . The acts complained of were sufficiently near the court. Most of them were within the court room, near the door of the court house, or within the city. Certainly they were not less remote than the publication denounced in *Toledo Newspaper Co.* v. *United States*."

It is inconceivable that after the *Nye* case it can be argued that the "reasonable tendency" doctrine remains the law. Reliance is placed by opposing counsel on other prior authorities (*Savin* case, 131 U. S. 267, 33 L. Ed. 150, *Cooke* case, 267 U. S. 517) (L. Ed.). The *Nye* case is now the law, and it is futile to argue prior decisions under exploded doctrines. The prior authorities cited, however, are distinguishable from the case at bar. In the *Savin* case a witness was intimidated upon the very premises of the court; whether the court personally was aware thereof at the time, such intimidation, to say the least, was not conducive to order or decorum in the courtroom. The statement in the *Cooke* case to the effect that the delivery of a scurrilous letter was contemptuous was plainly dictum; the conviction was reversed under principles of due process. It may be noted, moreover, that in that case the letter was

delivered by a party to the alleged contempt, and not by an innocent messenger. The opinion does not disclose whether Cooke accompanied him to the premises of the court. It could be argued that in each of the foregoing authorities, however, actual misbehavior occurred in the presence of the court. In the instant case no misbehavior there occurred. A discussion of such authorities is now, however, academic. The *Nye* case controls the instant case; neither under the facts nor the law can a substantial distinction between them be pointed out.

We noted heretofore that there is a second prerequisite, absent in the instant case, to summary punishment for contempt, viz.: breach of order or decorum, disruptive misbehavior.* It is conceded that no disorder or breach of decorum occurred in the instant case. It is unnecessary to consider whether it is not arguable that intimidating a witness (*Savin* case), shadowing jurors in the courtroom (*Sinclair* case), or delivery of a scurrilous letter by a party thereto, with possibly the same effect as though the denunciatory language were then verbally spoken (*Cooke* case), constitutes misbehavior involving a breach of decorum in the courtroom with or without disorder. Such conduct at least would not be construed as conducive to decorum. Hence these authorities can be reconciled with the doctrine that for punishable contempt there must be disorder or breach of decorum. If they cannot be so reconciled, they are no longer the law.

The doctrine of *Ex Parte Robinson* (86 U. S. 505, 22 L. Ed. 205), which but reiterated a principle earlier declared in *Ex Parte Poulson* (19 Fed. Cases 1205, Case No. 11350), was reaffirmed in the *Nye* case (l. c. 52):

> "It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

Opposing counsel have suggested that in the instant proceeding there was an interruption of the orderly con-

*See Nelles & King, Contempt by Publication in the United States, 28 Columbia L. Rev., l. c. 530, 531, 532.

duct of the business of the court. The same argument was made by the Circuit Court of Appeals in the *Nye* case (113 Fed. (2d) 1006, l. c. 1008), but was rejected by this Court. As a result, when in the instant case there was neither disorder, breach of decorum, nor interruption in the business of the court, there was plainly no misbehavior in the presence of the court within the authoritative interpretation of that term. See *Wimberly* v. *United States*, 119 Fed. (2d) 713, l. c. 714, and *Millinocket Theatre* v. *Kurson*, 39 Fed. Supp. 979, l. c. 980.

It is submitted that Mr. Justice Holmes, in his dissenting opinions, has drawn the plain, clear, proper distinction, a distinction requiring no clarification and precluding all confusion, between contempts punishable by summary process and contempts punishable by indictment. *Toledo Newspaper Co.* v. *United States*, *supra*, l. c. 422; *Craig* v. *Hecht*, 263 U. S. 255, l. c. 280, 68 L. Ed. 293. He approved the doctrine that punishment by summary process could be used only "to insure order and decorum in their presence", only for "the present protection of the court from actual interference", and not for "postponed retribution for lack of respect for its dignity". *Toledo Newspaper* case, *supra*, l. c. 422. As he phrased it in another dissent: "The statute on its face plainly limits the jurisdiction of the judge in this class of cases to those where his personal action is necessary in a strict sense in order to enable him to go on with his work." *Craig* v. *Hecht*, supra, l. c. 280. The textual authorities, to which reference has been made, fully support the historical soundness of these views. We submit that the dissenting opinions of Mr. Justice Holmes are now the law.

Petitioner Pendergast was not a party to the insurance rate litigation and is not shown to have been connected, directly or indirectly, with any court procedure followed. He is not shown to have had any notice or knowledge of any procedural steps intended to be taken.

A layman may be charged with knowledge of substantive law; he is not charged with knowledge of procedural law. The method pursued by the companies to obtain judicial approval of the proposed distribution was entirely unnecessary. The companies had an absolute right to dismiss; and, upon dismissal, under the controlling decisions of the Missouri Supreme Court (*Aetna Insurance Co.* v. *O'Malley*, 342 Mo. 800, 118 S. W. (2d) 3, l. c. 9, 10), the court was under the mandatory *jurisdictional* duty of turning over impounded funds to the Superintendent of Insurance for distribution. Under such circumstances, without evidence that such petitioner had any notice of the extrajurisdictional proceedings taken, recognizing that a criminal intent is as essential in a contempt proceeding as in any other offense (*United States* v. *Jose*, 63 Fed. 951, l. c. 954), the argument that Pendergast either knew, intended, or should have anticipated, that any act of his would take effect in the presence of the court, becomes absurd.

Acts of misconduct occurring at points remote from the vicinity of the court may justify indictment under the "effect" or "reasonable tendency" theory for obstruction of justice within the meaning of the second section of the Act of 1831; they cannot justify summary punishment upon information within the reasonable intendment of the restrictive provisions of the first section of that Act. In the phraseology of Mr. Justice Holmes, this proceeding was not initiated for the present protection of the court from actual interference, but as a means of postponed retribution for past acts. The action of the court below was not necessary in any sense in order to enable them to go on with their work. Petitioners, at the time of misconduct, were neither in the presence of the court nor in the required proximity thereto. No misbehavior either occurred in the vicinity of the court or disrupted its quiet, order and decorum or actually interrupted the court in the conduct of its business. Under all authorities, *save only the overruled opinion in the Toledo case*, the acts in

question do not constitute contempt punishable upon information*.

POINT II.

The prosecution of petitioners under the information was barred by the statute of limitations, since any and all acts of alleged contempt occurred more than three years next before the filing of the information.

Since misbehavior alone is the offense prosecuted, then that offense became complete if and when the misbehavior occurred. Misbehavior, in any normal sense of the word, means improper acts. Acts must have specific time and place. The specific time of the acts charged against petitioners was more than three years next before the filing of the information. The majority opinion proceeds upon the theory that the misbehavior in question was the presentation to the court for its approval of a fraudulent compromise. The motion for decree, reciting the fact of the compromise, was filed on June 18, 1935 (R. 603). The stipulation of settlement was filed on June 19, 1935 (R. 607). The actual compromise was consummated by an agreement of May 18, 1935. The appearances of counsel occurred shortly after the filing of the motion for decree and the stipulation of settlement. On February 1, 1936 the court entered its decree, pursuant to

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* A review of the record will disclose that, in purporting to distinguish the *Nye* case, the trial court, the majority opinion below, and opposing counsel, relied solely upon specific acts of misbehavior allegedly in the presence of the court. As we shall note hereafter, however, in purporting to avoid the bar of the statute of limitations, the trial court, the majority opinion below, and opposing counsel, embraced the theory that the contempt charged was a continuing conspiracy to deceive the three-judge court; they thereby abandoned their theory (relied upon to avoid the effect of the *Nye* opinion) that the misbehavior occurred in the presence of the court. If conspiracy constitutes the alleged contempt, it concededly did *not* occur in the presence of the court. Irresistibly, therefore, must the conclusion follow under the *Nye* opinion that no contempt punishable upon information is shown.

the motion filed, dismissing the causes and directing the distribution of the impounded funds (R. 617). Nothing occurred in the insurance rate litigation for more than three years thereafter, until on May 29, 1939 the successor Superintendent of Insurance filed a motion to cite the insurance companies to show cause why the decree of February 1, 1936 should not be vacated (R. 746). The information in the instant proceeding was filed on July 13, 1940 (R. 4). Hence it is undisputed that the information was not filed within three years next after the alleged contempt charged, with the result that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) is applicable:

> "No person shall be prosecuted, tried, or punished for any offense, not capital, ... unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed . . . . ."

This is a prosecution for criminal contempt initiated by an information in the name of the United States and prosecuted by the United States. A sentence of two years in the penitentiary has been imposed; punishment by fine or imprisonment in such a proceeding is unlimited. It can scarcely be argued, therefore, that this criminal contempt is not an *offense* within the meaning of the statute. That criminal contempt is such an offense was specifically determined by this Court in *Gompers* v. *United States*, 233 U. S. 604, l. c. 610, 58 L. Ed. 1115, *United States* v. *Goldman*, 277 U. S. 229, 72 L. Ed. 862, and *Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527. See also: *Hart Investment Co.* v. *Oil Co.*, 27 Fed. Supp. 713. The reasoning and language in the *Gompers* case (l. c. 612, 613) and in the *Grossman* case (l. c. 115) compel, it is submitted, the application of the foregoing statute of limitations to the instant prosecution. If it is applied, there can be no question but that the prosecution is barred.

The majority opinion below holds that the contempt here charged is contempt in the presence of the court, and that the statute of limitations is applicable neither by analogy nor enactment. We have noted under the assignment next preceding that the majority opinion brings the misbehavior charged into the presence of the court only constructively, and not actually, by resort to the causal effect doctrine of the *Toledo* case. Upon that assumption, however, such opinion proceeds upon the theory that the statute of limitations is applicable to every form of criminal contempt *except* that occurring in the presence of the court. By that reasoning prosecution for contemptuous violation of a judicial decree would be barred by limitations; by that reasoning prosecution for misbehavior, not in the presence of the court, but so near thereto as to obstruct the administration of justice, would be barred by limitations; but by that reasoning, however, prosecution for misbehavior in the presence of the court would *never* be barred by *any* statute of limitations. We submit that, for purposes of limitations, no such distinction can be created between different *forms* of the same *offense*. The pertinent matter is that any criminal contempt is an offense, as this court clearly ruled in the authorities cited; and it is difficult to understand upon what theory the majority opinion can rule that one form of criminal contempt is an offense while another form is not. If criminal contempt is an offense within the meaning of the statute of limitations, as held in the *Gompers* case, it is difficult to understand how the place of its occurrence could affect its character. If criminal contempt is an offense, then it is equally an offense wherever committed.

It is further difficult to understand upon what theory it can be argued that a criminal contempt constituted of the procurement of an order is subject to *no* statute of limitations, while a criminal contempt constituted of disobedience to an order is subject to such limitations. In

the *Gompers* case there was *no* formal information; in the instant case there *was* a formal information upon the official oath of the acting United States Attorney in the name of the United States. That information is being prosecuted by the United States concededly for criminal contempt. It, therefore, appears that the status of the instant proceeding as a prosecution for an *offense* within the meaning of the statute of limitations, *supra*, is clearer than in the *Gompers* case. The majority opinion does not seek to justify the distinction made upon principle; *it could not be thus justified;* it rests the claimed distinction solely upon the following statement in the *Gompers* case (233 U. S. 604, l. c. 606, 58 L. Ed. 1115):

> "The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt not committed in the presence of the court."

In thus stressing the foregoing excerpt the court below ignored the following sweeping declaration of policy in the same opinion (l. c. 612):

> "The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government."

Also disregarded is the excerpt from the opinion of Chief Justice Marshall, quoted by Mr. Justice Holmes in the *Gompers* case, wherein it is pointed out that not even treason could be prosecuted after a lapse of three years, and intimating that it would be manifestly incongruous for there to be *no* limitation upon the prosecution of a *lesser* offense.

The fallacy of the argument advanced below is that Mr. Justice Holmes, in excepting from the opinion in the *Gompers* case contempts committed in the presence of the

court, did not intend thereby that there should be no limitation upon prosecution of such contempts but, to the contary, intended that prosecution of such *direct* contempts should be more restrictively limited in time than the type of contempt there under consideration. An analysis of the *Gompers* opinion will reveal that Mr. Justice Holmes used the phrase contempt committed "in the presence of the court" in the usual accepted sense of *direct* contempt, of contempt *in the face of the court*, which can be punished, upon the personal knowledge of the judicial officer, without notice, information, evidence, hearing or trial. See *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, wherein the court intimated (l. c. 314) that there was a grave question whether that type of procedure could be approved either at a subsequent term or even upon a subsequent day of the same term. Clearly Mr. Justice Holmes did not intend his opinion (and such was the purpose of his exception) to be misconstrued as authorizing procedure of that character at any time within three years next after the occurrence of the misbehavior charged. Such is the general law. *Brewer* v. *State*, 176 Miss. 803, 170 So. (Miss.) 540; *In re Cary*, 165 Minn. 203, 206 N. W. (Minn.) 402; *In re Maury*, 205 Fed. 626; *Middlebrook* v. *State*, 43 Conn. 257, l. c. 269; *In re Foote*, 76 Cal. 543, 18 Pac. (Cal.) 678; *Brown* v. *State*, 178 Okla. 506, 62 Pac. (2d) 1208.

It thus appears that direct contempts in the presence or face of the court, in the sense that term is used, would require substantially instant and immediate action, or punishment (by that anomalous procedure) is barred. Constructive contempts, on the other hand, are uniformly barred by the application thereto of the general statute of limitations for criminal offenses. Hence under the general law there is no justification for the suggestion of the court below that the time for prosecution of contempts committed in the presence of the court is unlimited; as has been seen, such time (if punishment is to be assessed upon the personal knowledge of the court) is more rigidly

limited than in the case of other contempts. Where the prosecution, however, is initiated by information, for criminal contempt, as in the instant case, the statute of limitations, *supra*, is applicable thereto and bars that prosecution. Such has been the consistent construction of the *Gompers* case. *Appeal of Marks*, 144 Pa. Sup. Ct. R. 556, 20 Atl. (2d) (Pa.) 242; *In re Jibb*, 123 N. J. Eq. 251, 197 Atl. 12; *Hart* v. *Oil Co.*, 27 Fed. Supp. 713. The doctrine of the *Gompers* case is as well supported by the weight of authority. *Beattie* v. *People*, 33 Ill. App. 651; *Goodall* v. *Superior Court*, 37 Cal. App. 723, 174 Pac. 924; *Gordon* v. *Commonwealth*, 141 Ky. 461, 133 S. W. 206; *Brewer* v. *State*, 176 Miss. 803, 170 So. (Miss.) 540; *Pate* v. *Toler*, 190 Ark. 465, 79 S. W. (2d) (Ark.) 444; *State* v. *Phipps*, 174 Wash. 443, 24 Pac. (2d) (Wash.) 1073.

If a distinction is to be drawn between direct and constructive contempts, the contempt sought to be charged in the instant case is plainly constructive. No one would argue that the trial court, as in the case of direct contempt, could have proceeded upon its own knowledge without information, hearing or trial. If petitioners were in the presence of the court, their presence was constructive and not actual. Whether a given contempt is constituted of the procurement of an order or of disobedience to an order, whether the misbehavior is constructively in the presence of the court or merely in its vicinity, it remains a criminal contempt, subject to the same doctrines, rules and limitations, prosecuted in the same manner, punished in the same way. *Neither upon principle nor upon authority can the controlling effect of the Gompers case be avoided.* In the words of Mr. Justice Holmes, the power to punish for contempt must have some limit in time; this doctrine the majority opinion below ignored.

After the filing of the motion for decree, supported by the stipulation of settlement, the statutory court in the insurance rate litigation on February 1, 1936 dismissed the cause (R. 617). It reserved jurisdiction solely for the purpose of effectuating its then decree (R. 623). The majority opinion, by way of dictum, holds that so long as

such reservation of jurisdiction continued the cause remained pending before the statutory court, and that no prosecution for any contempt prior to February 1, 1936 could ever be barred so long as the cause remained pending in the sense aforesaid. In that sense the cause would continue to pend in perpetuity since it is a matter of common knowledge that *all* policyholders could *never* be found and hence the decree could *never* be completely effectuated. *In all deference to the court below, we submit that such a doctrine is novel and supported by authority from no jurisdiction.* It would completely nullify the doctrine of the *Gompers* case, and render nugatory the effect of any applicable statute of limitations. The authorities cited in the majority opinion (*Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405; *In re Maury*, 205 Fed. 626; *In re Cary*, 165 Minn. 203, 206 N. W. (Minn.) 402) do not sustain the proposition advanced by the court; they hold merely that, where punishment is sought to be imposed for a direct contempt committed in the face of the court, without information or trial, upon the basis of the personal knowledge of the judicial officer, the action taken must be substantially immediate, but may on occasion be deferred until the end of actual trial to avoid the dislocation of trial processes. They do not purport to authorize such punishment at *any* time, however long deferred, after the offense, merely because the court retained some vestige of jurisdiction in the cause. As pointed out *supra*, with authorities cited, the rule as to direct contempt and its punishment restricts rather than extends the time for action. This issue need not be further discussed since we understand the opinion below so to hold only upon the assumption that no statute of limitations applies to this contempt proceeding. *Such is not the law.*

The trial court and opposing counsel have argued that the contempt was constituted of a continuing conspiracy, with continuing effects, and that no statute of limitations could run so long as the conspiracy continued.* This reveals a manifest inconsistency. In attempted distinction of the *Nye* case, the trial court and opposing counsel have

argued that the only contempt sought to be charged was misbehavior in the presence of the court; in attempted avoidance of the bar of the statute of limitations, the trial court and counsel have argued that the contempt sought to be charged is conspiracy. Admittedly, *no conspiracy occurred in the presence of the court*. These two positions cannot be reconciled; the two theories are diametrically opposed. Upon the issue of limitations, the trial court and counsel have contended that the offense charged is not misrepresentations in open court, but a continuing conspiracy, carried out partly in court and partly out of court (*Brief in Opposition to Certiorari*, p. 47). Since the statute of limitations is plainly applicable to the offense charged, opposing counsel are confronted with this dilemma even upon the premise of their own theories: *If the contempt sought to be charged is a continuing conspiracy, then it is not misbehavior in the presence of the court or in the required proximity thereto and is not punishable upon information in this proceeding; if, on the other hand, the contempt sought to be charged is constituted of acts of misbehavior in the presence of the court, then this prosecution is barred, since all such alleged acts admittedly occurred more than three years next before its institution.* Counsel cannot change the form of the offense sought to be charged to meet the changing exigencies of different issues. No authority sustains the view that a conspiracy with overt acts in and out of court constitutes a single continuing contempt, *i.e.*, misbehavior in the presence of the court.

It is conceded that no act of misbehavior in the presence of the court occurred within three years next before the institution of this proceeding.* Under the theory of the courts below and opposing counsel, the last of such acts occurred in 1935. The decree approving the settlement was entered on February 1, 1936. Three years there-

*No such alleged contempt is charged in the information. Petitioners' pleaded bar of limitations cannot, therefore, be avoided by this afterthought.

after passed without any act on the part of either petitioner in or out of court. Any prosecution for claimed contempt was, therefore, barred before the time that O'Malley allegedly importuned McCormack or the latter allegedly committed perjury before the grand jury. As to the facts in this connection see the Statement, *supra*, pp. 9, 10. Neither the alleged importunity of O'Malley nor the alleged perjury of McCormack is claimed to have constituted contempt of the three-judge court. *Upon what theory under such circumstances can counsel argue that noncontemptuous acts in 1939 revived a contempt prosecution already barred by the statute of limitations?* No authority has been, or can be, cited to sustain such a proposition. *If one act in the presence of the court brought all acts (the others committed at points remote from the court) within the statute and rendered them punishable by summary process, then manifestly, in violation of the statute, the power to punish contempts would be extended to cases other than misbehavior in the presence of the court or near thereto. Hence it is readily apparent that the theory of conspiracy cannot be utilized to convert a series of acts, some in the presence of the court or near thereto, others remote therefrom, into a single continuing contempt, since so to do would subject an accused to punishment for the remote acts (as part of the continuing offense) which did not constitute misbehavior on his part in the presence of the court or near thereto; the restrictions and prohibitions of the Act of 1831 cannot be thus flouted.*

The foregoing proposition is fully sustained by authorities. In the *Hart* case (27 Fed. Supp. 713, l. c. 716) the court pointed out that a claimed conspiracy to conceal an offense could not be contemptuous. In *Doniphan* v. *Lehman* (179 Fed. 173, l. c. 174) the fundamental distinction between conspiracy on the one hand and contempt upon the other is clearly defined. Certainly it cannot be argued, as attempted by the trial court, that a particular act of misbehavior continues in contemplation of law so long as

its effects continue. Contempt is misbehavior; misbehavior is constituted of a particular act or particular acts; acts of misbehavior, as we have said, must necessarily have a specific time and place; and the act or acts end although the results may continue. The offense of contempt is complete when the act of misbehavior is committed; the statute of limitations then begins to run; and that statute is not tolled by the circumstance that, as it runs, the results of the misbehavior also continue. In point of fact, such a doctrine would in effect abrogate every statute of limitations; no act can be performed which does not have thereafter continuing results to a greater or less extent; and no court could ever apply a statute of limitations if it were compelled first to determine when the continuing results from a given act terminated. The argument in question would lead to grotesque consequences: thus, if misbehavior continues so long as the results of misbehavior continue, a given offender could be guilty of continuing misbehavior long after his death; and if the results continue until full disclosure is made, the misbehavior, if full disclosure were never made, would continue through all eternity. The argument advanced by the trial court, made upon a much more plausible basis than in the instant case, was rejected by this Court in *United States* v. *Irvine*, 98 U. S. 450; 25 L. Ed. 193. See also: *Lonabaugh* v. *United States*, 179 Fed. 476.

The controlling authority is the opinion of Mr. Justice Holmes in the *Gompers* case (233 U. S. 604, 58 L. Ed. 1115). There a number of contemptuous acts were charged, some prior to, some during, the three-year period immediately before the filing of the information. There, as here, the government sought to use the theory that the series of acts constituted a continuing offense by reason of a continuing conspiracy. Mr. Justice Holmes rejected the contention, and pointed out the distinction between conspiracy and contempt (l. c. 610). *He held that acts prior to the three-year period before the institu-*

tion of the proceeding could not even be taken into consideration (l. c. 613). He furthermore reversed the conviction, although certain of the contemptuous acts had occurred during the three years immediately before the filing of the information, upon the ground that no conviction could stand when based "mainly upon offenses that could not be taken into consideration" (l. c. 613). This is necessarily the law, since the statute of limitations provides that no person "shall be prosecuted, tried or punished" for any offense occurring more than three years before the information (R. S. Sec. 1044; 18 U.S.C.A., Sec. 582). That these petitioners are sought to be punished for acts occurring more than three years next before the filing of the information cannot be challenged. We have, therefore, under the *Gompers* opinion, this situation: *There, the conviction was based upon a series of contemptuous acts, pursuant to a conspiracy, occurring both prior to and during the three-year period immediately before the filing of the information, and it was held that the judgment of conviction could not stand; here, the convictions are based upon allegedly contemptuous acts prior to the three-year period before the filing of the information, and non-contemptuous acts during such period, and a fortiori the convictions cannot stand.* To phrase this plain, inevitable conclusion differently: Mr. Justice Holmes held, rejecting the continuing offense theory, that acts prior to the three-year period before the information could not be considered; in the instant case, therefore, no act of either petitioner occurring prior to July 13, 1937 can be considered. As a result, what remains for consideration in this record? *Even opposing counsel do not contend that petitioners were guilty of a single act of misbehavior in the presence of the court below or so near thereto as to obstruct the administration of justice after July 13, 1937.* The acts of O'Malley and McCormack in March of 1939 related not to the statutory three-judge court of the Central Division theretofore exercising jur-

isdiction in the insurance rate litigation, but to a grand jury of the Western Division investigating income tax evasion. It is undenied, and admitted, that no act of alleged contempt on the part of petitioners is shown within the requisite three-year period next before the filing of the information. Under the *Gompers* opinion, even if contemptuous acts were shown within the three-year period, these convictions would necessarily be subject to reversal since they are based upon acts prior to such period; when it appears that the only allegedly contemptuous acts upon which the convictions are based occurred more than three years prior to the filing of the information, not only must these convictions be reversed but no convictions can stand. The *Gompers* case controls.

The trial court, however, argued vigorously that non-disclosure of the offense, concealment of the offense, tolled the statute of limitations. The theory of the trial court was that the misbehavior occurred prior to February 1, 1936, but that more than three years thereafter O'Malley importuned McCormack to conceal the misbehavior, and that McCormack committed perjury. Responsibility therefor was sought to be fixed upon Pendergast on the theory only that such acts were pursuant to an original conspiracy to conceal by affirmative deception. We have reviewed the facts which do not sustain the theory. See Statement, *supra*, pp. 9, 10. We have heretofore discussed the proposition that non-contemptuous acts could not, under any legal theory, revive a prosecution already barred. The difficulty with the theory of the trial court, moreover, is that *it is not the law that non-disclosure or concealment of an offense tolls the statute of limitations.* The statute here involved contains no such exception.* Unless the exception is written into the terms of the statute that non-

*The only exception to the application of the above statute of limitations appears in the succeeding section excluding from its provisions "any person fleeing from justice". R.S., Section 1045; 18 U.S.C.A., Sec. 583.

discovery, non-disclosure, or concealment, shall toll or interrupt its running, the statute begins to run at the time of the offense, and continues to run without interruption to the point of final bar, irrespective of non-disclosure or affirmative acts of concealment on the part of the accused; and no court can write into such a statute exceptions which do not therein appear. This is the universal rule. *22 C. J. S., Sec. 231, p. 363; 22 C.J.S., Sec. 228, p. 360; 15 Am. Juris., Sec. 357, p. 37; Hart* v. *Oil Company, 27 Fed. Supp. 713, l.c. 716; State* v. *Nute, 63 N.H. 79, l.c. 80; Commonwealth ex rel.* v. *Sheriff, 3 Brewster (Pa.) 394, l. c. 396; State* v. *Locke, 73 W. Va. 713, 81 S. E. 401, l. c. 402.* Exceptions cannot be judicially written into statutes of limitation. *Commonwealth* v. *DeMaria, 110 Pa. Sup. Ct. R. 292, 168 Atl. 320; United States* v. *Salberg, 287 Fed. 208; United States* v. *Brown, 24 Fed. Cas. 1263, Case No. 14665; State* v. *Clemens, 40 Mont. 567, 107 Pac. 896.* Under the foregoing authorities the argument that the statute of limitations was tolled by any affirmative act of deception cannot, as to either petitioner, be sustained: (1) because the evidence fails to sustain the factual premise of the trial court, and, particularly as to Pendergast, the theory that any act of O'Malley or McCormack in 1939 is chargeable to him under the theory that it was pursuant to an original conspiracy; the evidence negatives any such conspiracy; (2) because the statute of limitations in question contains no exception whereunder its running is tolled on account of affirmative acts of concealment, and accordingly the effective running of the statute could not be tolled or interrupted by reason of any such acts; and (3) because the running of the statute, once begun, cannot be thereafter interrupted by any subsequent event. The prosecution of this information is barred and the convictions must be reversed.

POINT III.

The convictions below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioners under the information is in violation of an agreement with the United States.

The facts relating to the agreement with the United States have been heretofore reviewed. Statement, *supra*, pp. 11 *et seq.* Under the undisputed facts, two conclusions are inescapable: (1) that the United States agreed not to prosecute for alleged contempt, and that the United States attorney thoroughly understood the agreement; (2) that prosecution by the United States breached that agreement. The United States Attorney prosecuted in his official capacity, and not as *amicus curiae*.

It is clear that petitioners have the right in the instant proceeding to invoke the benefit of this agreement under which it was particularly covenanted by the United States that there would be no prosecution for contempt. There can be no question but that the present prosecution has been initiated and is being conducted by the United States. It originated in an information upon the official oath of the acting United States Attorney in the name of the United States. It is prosecuted by the United States. Punishment has been imposed by sentences to be served in a penitentiary of the United States. The proceeding is one for criminal contempt between the United States on the one hand and petitioners upon the other, and is neither incidental nor ancillary to the civil insurance rate litigation. It is an independent criminal proceeding at law. It has been under the control of the United States in every respect from its inception.

An agreement of the character described concededly creates no legal rights which justify at law a plea in bar. It does, however, confer upon the accused an unmistakable equitable right which will be judicially enforced. That right is the right to executive clemency because; in the words of this Court in the authority cited *infra*, "public

policy and the great ends of justice" require that the United States keep faith. The benefit of the agreement is preserved procedurally by staying further proceedings indefinitely until executive clemency can be had. *United States* v. *Ford*, 99 U. S. 593, 25 L. Ed. 399. The stay granted is indefinite in duration because no court will assume that the Executive will deny the pardon to which the accused is equitably entitled. The power of the Executive to extend clemency for the offense charged is unquestioned. *Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527. See also: *State* v. *Guild*, 149 Mo. 370, l. c. 376, 50 S. W. 909.

There can be no distinction between the equitable right flowing from an agreement between the United States and an accomplice, in consideration whereof the latter testifies, and the equitable right flowing from an agreement between the United States and an accused, in consideration whereof the latter pleads guilty to one offense under a stipulation on the part of the United States that he will not be prosecuted for other related offenses. This equitable right was duly pleaded (R. 35), and its disregard requires reversal with a stay of further proceedings.

The issue is not, as suggested by the majority opinion, whether the United States Attorney bound or attempted to bind the statutory court; the issue is that the United States Attorney *did* bind the United States. This is a prosecution by the United States and under its control, and not a prosecution by the trial court initiated by citation. If the court had proceeded independently of the United States, a different question, academic here, might be presented. *It did not do so.* The United States prosecuted, and, prosecuting, violated its agreement. We submit that the United States must keep its covenant.

POINT IV.

The court below was without jurisdiction to entertain this proceeding; and the conviction of petitioners was not validated by the circumstance that one of the members of the purported statutory court, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation.

The court below purported to act as a statutory court constituted in accordance with the provisions of Section 266 of the Judicial Code (28 U.S.C.A., Sec. 380). The jurisdiction of a statutory court is of an extremely limited equitable character, and is restricted to the granting or denial of injunctive relief against the enforcement of unconstitutional statutes. *Phillips* v. *United States*, 312 U. S. 246, 85 L. Ed. 800; *Public Service Commission* v. *Brashear Freight Lines*, 312 U. S. 621, 85 L. Ed. 1082; *Ex parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249. That limited statutory equitable jurisdiction could not extend to entertaining a prosecution by the United States at law for criminal contempt. The latter is a prosecution for an offense against the United States. It is between the public and the defendants. It is neither a part of nor incidental or ancillary to the cause out of which the contempt originally arose. *Gompers* v. *Stove Co.*, 221 U. S. 418, 55 L. Ed. 797; *Russell* v. *United States*, 86 Fed. (2d) 389, l. c. 392; *Michaelson* v. *United States*, 266 U. S. 42, l. c. 64, 69 L. Ed. 162, l. c. 167. Under the foregoing authorities a prosecution for criminal contempt is "a separate and independent proceeding at law" (*Gompers* case, l. c. 451; *Michaelson* case, l. c. 64). As was pointed out in the *Gompers* case (l. c. 444), if this was not a proceeding at law for criminal contempt, but was incidental to the original equitable litigation, the court below was without authority to impose a punitive sentence. In point of fact, the instant proceeding in its course from origin to final judgment is the converse of the *Gompers* case.

There the proceeding began as incidental to equitable litigation and, upon final judgment, was sought to be converted into an action at law for criminal contempt. Here the proceedings began upon information filed by the United States as a proceeding at law for criminal contempt, and at the time of final judgment the trial court sought to convert it into a proceeding incidental to the original equitable litigation (R. 66, 1184). Neither attempt can be approved under the *Gompers* opinion. Although the trial court, by the mere restyling of pleadings already filed, sought to convert this proceeding into one incidental to the insurance rate litigation, upon the theory that the statutory court could exercise jurisdiction in that type of proceeding, it nevertheless attempted to impose punitive sentences forbidden in an incidental or ancillary proceeding. *Gompers* v. *Stove Co.*, *supra*. The character of such a proceeding, moreover, is not tested by any artificial standard such as the styling of the cause. If it is initiated by information by the United States, and is designed for punitive purposes for past acts, it cannot be incidental to any other litigation and is an independent prosecution: *Gompers* v. *Stove Co.*, *supra*; *In re Fox*, 96 Fed. (2d) 23, l. c. 25; *United States* v. *Bittner*, 11 Fed. (2d) 93, l. c. 95. It scarcely need be argued that the statutory court possessed no criminal jurisdiction at law over such a proceeding. *Hence we are confronted with this situation: the statutory court was without jurisdiction since this was a criminal prosecution at law, but if the statutory court was right in styling it as incidental to equitable litigation, that court was without authority to impose a punitive sentence.* In either event petitioners' convictions and sentences cannot stand.

The trial court in its opinion ruled (R. 22):

> "It is contended that this court 'is a statutory tribunal of limited jurisdiction and that it is without jurisdiction in this proceeding.' The reasoning of counsel is this:

> "This three-judge court is a three-judge court of the *Central Division* of the Western District of Missouri, and is 'A *separate and distinct tribunal' of that division*. *Steers* v. *U. S.*, (C. C. A. Mo.) 297 Fed. 116, 118. By rule of court made pursuant to statute (Title 28, Sec. 27, U. S. C.) Judge Collet now is the federal district judge assigned to the Central Division. Judge Collet, therefore, and he alone, has jurisdiction of offenses committed against any federal district court (three-judge court or otherwise) sitting in and for the Central Division, *provided the offense is an independent proceeding and not incidental to the original litigation pending before the three-judge court*.
>
> "The reasoning is sound. The last mentioned hypothesis is error."

It will be noted that the trial court conceded that the reasoning was sound, but argued that the hypothesis, *i. e.*, that this prosecution for criminal contempt is an independent proceeding, was error. It is plain under the authorities that the hypothesis is *not* error but the law. Hence the only court with jurisdiction over this proceeding was Judge Collet, who, by rule of court made pursuant to statute, was the federal district judge assigned to the Central Division. This Court clearly indicated that the purported statutory court was without jurisdiction. *Pendergast* v. *United States*, 314 U. S. 574, 86 L. Ed. 55.

When the trial court was without jurisdiction, its action could not be validated by the circumstance that one of its members, *at the time of the institution of the original insurance rate litigation*, was judge of the Central Division of the Western District of Missouri. *The question presented is whether the statutory court was vested with jurisdiction over this proceeding at the time this*

proceeding was instituted. Jurisdiction was plainly lacking.

Conclusion.

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX.

The statutes of the United States involved:

28U.S.C.A., Sec. 385. (Judicial Code, section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonments, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R.S. Sec. 725; Mar. 3, 1911, c. 231, sec. 268, 36 Stat. 1163.)

18 U.S.C.A., Sec. 241. *(Criminal Code, section 135.) Attempting to influence witness, juror, or officer.* Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000 or imprisoned not more than one year, or both. (R.S. Sections 5399, 5404; Mar. 4, 1909, c. 321, sec. 135, 35 Stat. 1113.)

18 U.S.C.A., Sec. 582. *Offenses not capital.* No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes the period of limitation shall be six years. This section shall apply to acts, offenses, or transactions where the existing statute of limitations had not yet fully run on November 17, 1921; but the proviso shall not apply to acts, offenses or transactions which on that date were already barred by the provisions of existing laws. (R.S. Sec. 1044; Apr. 13, 1876, c. 56, 19 Stat. 32; Nov. 17, 1921, c. 124, Sec. 1, 42 Stat. 220.)

28 U.S.C.A., Sec. 380. (*Judicial Code, section* 266 amended.) *Same; alleged unconstitutionality of State statutes; appeal to Supreme Court.* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a

majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order, at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final deter-

mination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit. (June 18, 1910, c. 309, Sec. 17, 36 Stat. 557; Mar. 3, 1911, c. 231, Sec. 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)

The Missouri statutes involved (R. S. Mo. 1919):

SEC. 6270. *Public rating record to be maintained--contents thereof--analysis of rate to be furnished policyholder.*--Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall maintain a public rating record from which the rate of premium applicable to each risk in this state to be written by such company or other insurer may be ascertained in advance of the making of insurance thereon. Such rating records shall include, in so far as applicable, general basis schedule embodying basis rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of practice. Such records shall also show the forms and indorsements upon which each rate is predicated, and shall further show the changes of rate to be made on account of each and every change of form or indorsement. Such rating records shall be open to the inspection of the entire public and shall be maintained in such a form that the property owner can readily ascertain the rate charged on any class of property and the make-up of such rate. Every fire insurance company or other insurer authorized

to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall upon the issuance of a policy furnish to the holder thereof a written or printed analysis of the rate or premium charged for such policy, showing the items of charge and credit which determine the rate. (Laws 1915, p. 313.)

SEC. 6274. *Public rating records to disclose correct rate--rates may be changed--notice of increase necessary --copies of all rating records to be filed.*--All public rating records required to be maintained by this article, whether kept by insurers separately or actuarial bureaus, shall show the rate which such insurer proposes to charge and collect, but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower its rate or rates whenever it sees fit: *Provided,* that rates shall not be raised until at least ten days' notice has been given by the insurance company to the superintendent of insurance and his approval obtained, but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance. Changes of rate on account of physical hazard of any property, or on account of changes and improvements therein shall be immediately made when the facts warrant, and such change of rates shall become operative immediately when made. New or unrated risks may be written temporarily for a period of not exceeding sixty (60) days, within which period such risks shall be rated as provided herein, and policies of insurance covering such risks shall carry the rate so made from the beginning of the term of insurance. Copies of all public rating records, whether kept by companies separately or actuarial bureaus, shall be filed with the superintendent of insurance not later than ninety days after the taking effect of this article, and notice of all changes made therein shall be immediately filed with the superintendent of insurance, and such public records and changes therein and modifica-

tions thereof shall be open to free public inspection and examination at all reasonable hours of each business day. (Laws 1915, p. 313.)

SEC. 6281. *Companies to report premiums, losses, expenses and earnings on unearned premiums.*--Every stock fire insurance company licensed to do business in this state shall annually before March 1st of each year report to the superintendent of insurance the total amount of its premiums, losses and expenses for or on account of business in this state for the preceding year. In reporting expenses it shall separately state its disbursements and expenses for:

(a) Commissions paid to agents.
(b) Salaries paid.
(c) Taxes paid.
(d) Other underwriting disbursements.

Each such company shall also report the total amount of its earnings on unearned premiums, and such other matters as the superintendent of insurance may require. And all insurance adjusters, whether employed regularly on a salary, or acting in the capacity of adjuster by special contract, for or on account of any fire insurance company, shall be considered an employe of said company and be subject to regulation and requirements of the fire insurance laws of Missouri as if they were originally commissioned agents therefor. (Laws 1915, p. 313.)

SEC. 6283.* *Superintendent to investigate reasonableness of rates--may regulate rates charged.*--The superintendent of insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this state by the stock fire insurance companies for the five years next preceding such investigation are produc-

*As amended, Laws, 1923, p. 235.

ing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the superintendent of insurance shall be applied by the companies, subject to his approval. If the companies do not, within thirty days, submit a classification, or classifications, which meet the approval of the superintendent of insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the question of rates and profits, in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis, and whether or not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe or speculative investment of funds.

SEC. 6287. *Penalties for violation.*--The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion revoke the license of such offending company, officer or agent, but the revocation of the said license shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall willfully do or cause to be done or shall willfully

suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall willfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or willfully suffer or permit any act, matter or thing so directed by this article to be done; not to be done, or shall be guilty of any infraction of this article, shall be deemed guilty of a misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense; *Provided*, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination, such person shall be punished by a fine of not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment. (Laws 1915, p. 313.)

SEC. 6311. *Removal to or commencement of suit in federal court grounds for revocation of license*--notice.--If any foreign or nonresident insurance company, corporation, association or concern of any kind, including fraternal or beneficial associations or corporations and surety companies or corporations, organized and incorporated under the laws of any other state, territory or country, and doing business in this state under the laws of this state regulating and authorizing the licensing of any such company, corporation, association or concern by the superintendent of the insurance department of this state, shall, without the written consent, given and obtained after the filing of such suit or proceeding in the state court, of the other party to any suit or proceeding brought by or against it in any court of this state, whether suit or proceeding be pending in the state at the time of, or be brought after the taking effect of this section, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the superintendent of the insurance department to forthwith revoke all authority to such company, corporation, association or concern, and its

agents, to do business in this state, and such company, corporation, association or concern shall not again be authorized or permitted to do business in this state at any time within five years from the date of such revocation. And the superintendent shall publish such revocation in at least six newspapers of large and general circulation in the state: *Provided, however*, that the revocation of such authority shall not in any manner affect the duties and liabilities of any such company, corporation, association or concern under any policy or contract of insurance issued by it prior to and in force at the time of the revocation of such authority. (R. S. 1909, Sec. 7043.)